IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.442 OF 2001

Chandrakant Mallya Maienkar]
Age 25 years, Occ: Labourer]
Resident of Ashok]
Samratnagar Zopadpatti,]
Majivada, Thane] ..Appellant

Vs.

State of Maharashtra]
(Inspector of Police]
Kapurbawdi Police Station]
Thane).] ..Respondents

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Mr.S.V.Marwadi with Smt.Radhika Chary Advocate for Appellant
Mr.A.M.Shringarpure A.P.P. for State

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CORAM: N.V.DABHOLKAR AND SMT.V.K.TAHILRAMANI,JJ.

DATE : JANUARY 19,2006

ORAL JUDGMENT (PER N.V.DABHOKAR,J.):

1. By this appeal under Section 374(2) of Code of Criminal Procedure, the appellant challenges judgment and order dated 22nd June, 2001 delivered by Additional Sessions Judge, Thane in Sessions Case No. 556 of 1999. By the said decision, the appellant is held guilty for the offences under

Sections 498-A and 302 of IPC. He is sentenced to suffer R.I. for two years and life imprisonment on respective counts. On both the counts, fines and default sentences are also awarded. Substantive sentences are directed to run concurrently.

2. The prosecution case which can be summed up, is as follows:

. The incident in question took place on 23rd July, 1999 at 16.00 hours at Ashok Samratnagar Zopadpatti, Majiwada, Thane. The victim of the incident namely Sangita was wife of the accused. Admittedly, the marriage was solemnised about an year before the alleged incident.

. It is the case of the prosecution that immediately after the marriage, couple cohabited for some period at Gulbarga the native place to which the parties belonged. Thereafter, in search of livelihood, accused shifted to Thane along with the deceased. He was residing in rented premises which were owned by one Havlappa Dande. According to prosecution witnesses and especially P.Ws.1 to 3 i.e. Babu, Dagdu and Subhash who are brother and two uncles of the deceased, accused was addicted to

liquor and there used to be bickering between the spouses on that count. Accused used to illtreat the deceased as and when she objected to his drinking habit. On the alleged day, the accused had picked up a quarrel with the deceased since 10.00 a.m. Pursuation on the part of wife that he should not consume liquor was futile and being enraged with the same, accused is said to have poured kerosene on the person of Sangita and ignited her by a match-stick. Of course this part of the incident took place at about 4.00 p.m.

. Sangita was taken to Civil Hospital, Thane by P.W.1 Babu (brother of the deceased) and his father). While she was admitted in the burns ward, her statements were recorded by Sarala Mehta (P.W.5) a member of the Mahila Dakshata Samiti and also by A.P.I. Daniel Ben. These statements are at Exhibits-21 and 28 respectively. Further part of the investigation was carried out by P.W.9 Shantaram Tayade who also submitted the charge-sheet and the trial ended in conviction as above.

. P.W.4 Dr.Shripad Pathak was the Medical Officer attached to Civil Hospital, Thane and after

autopsy, he has opined that Sangita died because of shock due to burn injuries. Dr.Sunil Kharat (P.W.6) is another Medical Officer on record. He had certified fitness of the victim to make statement when both the dying declarations were recorded. The defence has brought on record at Exhibit-26 the certificate regarding burn injuries suffered by the accused during the cross-examination of Dr.Kharat. P.S.I. Sitaram Shinde had drawn spot panchnama and inquest and thus, participated in some part of the investigation.

. So far as the evidence that is rendered by relatives of the victim, all of them have narrated the accused being addicted to liquor and marital life of the accused and deceased being disturbed because of that. All of them claimed to have heard Sangita when she was admitted in the hospital narrating them to have been set on fire by the husband. Thus, all three relatives spoke about oral dying declaration of the victim.

3. In this matter, the accused has come out with a very bold defence and we intend to reproduce the answers by accused in response to question nos.45

and 48 during the course of his statement under Section 313 of Code of Criminal Procedure, in verbatim;-

"Q.45: Why the above named prosecution witnesses gave evidence against you?

Ans: Babu P.W.1 is on cross terms with me. My wife Sangita was not ready to stay at Thane as she was not able to understand the local language.

Q.48: Do you want to say anything more about this case ?

Ans: My wife did not conceive, so she was under tension and she wanted to go to native place. There was no work available. So our financial condition is very bad. On that day she was very much disturbed so she poured kerosene on her body and set herself on fire and thus committed suicide. I tried to save her but I could not succeed. I also sustained burn injuries on my hand and other parts of body.

. Babu P.W.1 was on cross terms with me and so he has lodged a false case against me."

. It may be stated that the accused has propounded a bold defence case. According to him, the wife was disgusted by the fact situation around her i.e. she being away from native place, husband not having any source of income, she herself not having been gifted any child and so on. According to him, she in a depressed state of mind, set herself on fire in an attempt to commit suicide and he has suffered burn injuries while trying to extinguish the fire.

4. We have heard Shri. S.V.Marwadi and Shri.A.M.Shringarpure for the respective parties. The two lawyers have together taken us through the important part of evidence and reasons recorded by the learned Judge.

. On going through the impugned judgment, unfortunately, it must be said that learned Judge has gone totally astray as far as finding on the

issue regarding offence under Section 498-A of IPC. As can be seen from the depositions of three relatives of the victim, all of them claimed that accused was addicted to liquor and wife objected to the same. There were quarrels on the issue and occasionally accused also beat the wife when she objected to his consumption of liquor. Beyond this, there is no other material on record aimed at establishing the offence punishable under Section 498-A of IPC.

. Ordinarily, in the cases of bride burning, the stories regarding illtreatment or cruelty to which the wife is subjected, come through the mouth of her relatives and their claims that they have heard the narration of the wife. This is an exceptional case wherein the brother of the deceased Sangita, P.W.1 Babu, has said that on couple of occasions, he was a witness to the abusing and beating by the accused to his sister deceased Sangita.

. The learned trial Judge in the course of discussion in paragraphs 10 and 11 of the judgment observed that essential ingredients of ‘cruelty’ as defined in explanation to Section 498-A are not strictly attracted but the wilful conduct of

pouring kerosene and igniting the wife to fire, will have to be treated as high degree of 'cruelty'. It is in the light of such observations by the trial Court, we are required to record a harsh observation that the learned trial Judge has totally lost sight of the definition of 'cruelty' which is punishable under Section 498-A. The said definition requires the husband and his relatives to harass or illtreat the wife and such harassment/illtreatment should drive the wife to commit suicide. As a second limb, the harassment and illtreatment aimed at pressurising wife or her relatives to satisfy illegal demands, is treated as cruelty under Section 498-A of IPC. In the matter at hands, even if we accept the prosecution averments without any deduction, it is neither the claim of the relatives that Sangita committed suicide nor it is their claim that accused was raising any demands and in order to seek satisfaction of those; was illtreating Sangita as a part of pressure tactics. The ingredients of definition of 'cruelty' are therefore not at all attracted and hence, offence under Section 498-A cannot be held to have been proved. Even pouring kerosene and setting on fire is not said to be aimed at the purpose of pressurising wife to

satisfy the demands. Section 498-A sails smooth when tagged together with Section 306 or 304-B of IPC but it does not match well with Section 302 of IPC, especially when there is no averment about any demands by the husband. We must, therefore, say that the trial Court erred in recording the finding of accused being guilty for the offence punishable under Section 498-A of IPC and the judgment of the trial Court requires to be rectified to that extent.

5. So far as the offence of murder is concerned, as already stated earlier, accused has set up a parallel story. According to the accused, the deceased Sangita was disgusted because of fact situation in which she was trapped, she attempted to commit suicide and he tried to extinguish her.

. In order to substantiate the charge of murder, the prosecution has relied upon dying declarations, three oral and couple recorded. So far as the oral dying declarations are concerned, P.W.2 Dagadu and P.W.3 Subhash both of them claimed to have spoken to victim while she was admitted in the hospital. However, during their cross-examinations, it has come out that they were making such a statement of

having heard oral dying declarations for the first time before the Court. Such claims were at the cost of improvement over and above statements as recorded by the police and this should be sufficient reason to look these claims of oral dying declarations with firm disbelief.

6. So far as P.W.1 Babu is concerned, he is the real brother of the victim. He claims to have reached the house of the victim upon hearing commotion. He admits the presence of accused and he also admits the accused having suffered some burn injuries during the course of his cross-examination. According to Babu, he and his father took victim Sangita to civil hospital in the Autorickshaw and upon questioning by the father during journey to civil hospital, Sangita informed him that while she was attempting to pursuade the husband not to consume liquor, accused poured kerosene on her person and ignited her by a match-stick. This dying declaration has not come at the cost of improvement and the same cannot be rejected outright, the way we are inclined to reject the claims of dying declarations heard by P.W.2 Dagadu and P.W.3 Subhash.

7. Advocate Shri.Marwadi while submitting for accused, took a bold stance. He states that the defence does not at all deny the presence of the accused, defence also admits that Sangita suffered burn injuries and died as a result of those burn injuries on the next day. On behalf of appellant, Shri.Marwadi impliedly challenged the truthfulness of the dying declaration itself. He has strenuously taken us through the depositions of both the Officers who recorded the dying declarations viz. Sarala Mehta (P.W.5) who is member of Mahila Dakshata Samiti and Daniel Ben (P.W.7) who is a Police Officer attached to local Police Station at the material time. The depositions of these two witnesses and dying declarations recorded by them are accepted by the trial Court as trustworthy and reliable pieces of evidence. This is because their testimonies are also supported by Medical Officer Dr. Sunil Kharat (P.W.6) who claims that he had examined Sangita before both the authorities recorded her dying declarations, he found her to be conscious and oriented to make verbal statement and therefore, he certified accordingly. Thereafter two authorities had recorded statements of victim Sangita. On reference to Exhibits-21 and 28, it is evident that

there is only one endorsement by the Medical Officer but in the light of ratio laid down by the Supreme Court in the matter of **Laxman Vs. State of Maharashtra reported in AIR 2002 S.C. 2973**, that "defective certification or even absence of certification does not make the dying declaration unrealiable, if the authority recording dying declaration is satisfied about the fitness of the patient to make a statement". Advocate Shri.Marwadi therefore, justifiably chose not to rely upon minor defects in the procedure followed for recording two statements by the two authorities. Yet, we are unable to avoid temptation of recording possibility that probably both the dying declarations are recorded simultaneously. P.S.I. Ben has in fact, obtained the attestation of Smt.Sarala Mehta in the margin to the effect that the statement is recorded in her presence and that was correctly recorded as per narration of the patient. From the fact that offence is registered on the basis of this statement at 19.05 hours and endorsement by the Medical Officer Dr.Kharat at Exhibit-28 at 6.30 p.m., it can be inferred that recording was concluded at about 6.30 p.m. Exhibit-21, as can be seen from the endorsement at the top, is recorded

between 6.00 to 6.30 p.m. We have, therefore, ventured to record that probably both the dying declarations were simultaneously recorded. The statement as recorded by Smt.Sarala Mehta is somewhat cryptic because she has recorded it in the format generally used by Special Executive Magistrates for recording dying declarations. Consequently, it appears that she has put the questions in the format to the patient and she has confined to record answers to the questions. The dying declaration recorded by Shri.Ben is quite elaborate in which Sangita has given history right from her marriage and also the occurrences of the day. According to her, the incident had commenced at about 10.00 a.m. and it terminated in husband's setting her on fire at about 4.00 p.m.

. It is at this juncture, the learned counsel for the appellant has assailed the dying declarations. According to him and the said contention cannot be brushed aside lightly; prosecution has not been able to provide any motive or even smallest reason as to why husband could have set the wife on fire. As rightly submitted by him, if at all the husband was a drunkard, the wife had a reason to be aggrieved. If husband was not earning, wife by

that had reason to be unhappy. This is not a case wherein prosecution claims that accused was pressing certain demands from the wife or her relatives. This is not a case wherein the prosecution claims that accused-husband had suspected about the character of the wife. We have referred to these two illustrations, which frequently occur in bride burning cases as motive for the husband to commit murder of the wife. The learned counsel is justified in submitting that prosecution has not provided any motive or even smallest reason for husband to set the wife on fire.

8. Admittedly, the husband was present and he has suffered 9% burn injuries. Certificate Exhibit-26 regarding burn injuries suffered by the accused is brought on record during the cross-examination of Dr.Kharat (P.W.6). He has suffered burn injuries to left forearm and dorsal aspect of the hand, left shoulder laterally, right forearm and hand, again dorsal aspect and also on nose and right cheek. The total percentage of injuries was 9%. It is his claim that the injuries were suffered in his attempt to extinguish fire. No doubt, on reference to panchnama of the scene of offence, police do not

seem to have noticed existence of water on the ground or existence of any blanket which was used for covering the victim in order to extinguish the fire. But that may not cut across the story propounded by the defence. If there was no other material available or because no other material could be used at the location (the tenement occupied by the couple appears to be mezzanine floor room), the accused was bound to use his hand in extinguishing the fire. Absence of any extinguishing material referred in the panchnama of scene of occurrence therefore, does not adversely affect the defence theory.

9. While challenging the truthfulness of recorded dying declaration as also oral dying declaration by P.W.1 Babu, the learned counsel has taken us through the cross-examination of P.W.1 Babu which demonstrates that Babu had some reason to grind axe against the accused. P.W.1 Babu has admitted; "I did not like my sister marrying with the accused". Babu in his cross-examination paragraph 6, has admitted the fact that accused had suffered partial burns. The learned A.P.P. during the course of his argument, has not been able to point out any material whether there was any attempt on the part

of the prosecution to explain the burn injuries suffered by the accused. Consequently, advocate Shri.Marwadi has placed reliance upon the observations of the Supreme Court in the case of **Laxmi Singh and others etc. Vs. State of Bihar reported in AIR 1976 S.C.2263**, more particularly on the observations which are as follows:

> . " It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:
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> . (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> . (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore

their evidence is unreliable;

. (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one".

. Out of all the three inferences, the second one is not applicable to the case at hands. The first one is of significant importance in the cases of free fights between two individuals or groups and when there is question to be determined by the Court as to which of the parties was aggressive and which was exercising right of self defence. However, advocate Shri.Marwadi was justified in placing some reliance on the third possible

inference as laid down by the Apex Court. Shri.Marwadi pointed out that the accused has raised a positive defence that wife committed suicide and he tried to extinguish the fire and therefore, he suffered burn injuries.

. To some extent, we were reluctant to borrow the observations as applicable in our case, because **Laxmi Singh's case (supra)** was a case of assault by five individuals upon two victims and not a case of bride burning. However, in the peculiar facts and circumstances of this case and more particularly, the bold defence raised by the accused, the inference as prescribed at serial no.3 in the ruling is capable of challenging the text of dying declaration and its truthfulness.

. As already pointed out, the dying declaration recorded by Inspector Shri.Ben was quite elaborate wherein the victim gave history right from the date of her marriage, yet it is not the claim of the victim that accused in order to ensure that she is sufficiently on fire, had gripped. As earlier argued by the learned counsel for the appellant if the accused had poured kerosene and ignited the wife, ordinarily he may not wait there but he would

make the escape good. In the matter at hands, he is very much waiting there, he has proceeded to the hospital with the victim where she was subjected to examination and treatment, he has suffered 9% burn injuries which were visible and known to the prosecution side and yet, neither the witnesses who deposed nor the dying declaration explains the cause for the injuries suffered by the accused. Since the dying declaration does not claim the accused to have gripped the victim for the purpose that the victim should get sufficiently ignited, the theory propounded by the accused competes with the prosecution story with full strength and learned counsel for the appellant was justified in praying for acquittal so far as charge under Section 302 of IPC is concerned, at least, by virtue of benefit of doubt.

10. The appeal is therefore allowed. Judgment and Order dated 22.6.2001 delivered by Additional Sessions Judge, Thane in Sessions Case No.556 of 1999 convicting the Appellant-Chandrakant Mallya Maienkar for the offences under Sections 498-A and 302 of IPC, is quashed and set aside. He is acquitted of all the charges levelled against him. He be set to liberty forthwith, if not required in

any other case. Fine amount if any, deposited by the appellant, shall be refunded to him.

. Registrar (Judicial) shall ensure early dispatch of appropriate writ.

[N.V.DABHOLKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]